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No. 03-585

In The
Supreme Court of the United States

CROWN EQUIPMENT CORPORATION,

Petitioner,

v.

WILLIAM McEUIN,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICI CURIAE BRIEF OF AMERICAN INSURANCE ASSOCIATION, ASSOCIATIONS OF SOUTHERN CALIFORNIA DEFENSE COUNSEL AND DEFENSE COUNSEL OF NORTHERN CALIFORNIA AND NEVADA IN SUPPORT OF CROWN EQUIPMENT CORPORATION'S PETITION FOR CERTIORARI

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CORPORATE DISCLOSURE STATEMENT

Amicus curiae American Insurance Association ("AIA") is a national trade organization whose members comprise over 400 insurance companies writing property and casualty insurance in every state and jurisdiction of the United States. AIA is a non-profit Delaware corporation headquartered in Washington, D.C. which maintains seven regional offices and retains legislative counsel in every state capital. AIA is not a publically held company and does not issue shares to the general public.

Amici curiae Associations of Southern California Defense Counsel and Defense Counsel of Northern California and Nevada ("Defense Counsel") are non-profit California corporations organized as voluntary professional associations with over 3,000 member-attorneys established to promote the administration of justice and to enhance the standards of civil defense and trial practice in the state and federal courts. Defense Counsel are not publically held companies and do not issue shares to the general public.

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TABLE OF CONTENTS

	Page
CORPORATE DISCLOSURE STATEMENT	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
INTRODUCTION AND INTEREST OF AMICI CURIAE	1
ARGUMENT	5
I. Since Due Process Requires "Exacting Scrutiny" of the Evidence Supporting a Plaintiff's Punitive Damages Claim, That Same Heightened Standard Should Apply to Rulings that Exclude Exculpatory Evidence Refuting the "Reprehensibilty" of a Defendant's Conduct with any Doubts Resolved in Favor of Admissibility	5
A. Exclusion of Relevant Exculpatory Evidence Deprived Crown of Important Constitutional Safeguards in its Defense of the Punitive Damages Claim	5
B. Evidence of Defendant's State-of-Mind Refuting Plaintiff's Claim of Malice is not "Hearsay"	7
C. Rule 403 Considerations Were Insufficient to Justify Denial of Crown's Constitutional Right to Offer Relevant Exculpatory Evidence	10
II. Before and After the Trial, the Lower Courts Failed to Apply the Constitutional Standard of Exacting Scrutiny When Evaluating the Alleged "Reprehensibility" of Crown's Conduct	11

TABLE OF CONTENTS – Continued

Page

III. As Illustrated by the Majority Opinion in This Case, Decisions Within the Ninth Circuit Are Applying Due Process Principles in Punitive Damages Cases in an Arbitrary and Inconsistent Manner That Conflicts With This Court's Constitutional Jurisprudence 15

CONCLUSION 18

TABLE OF AUTHORITIES

Page

CASES

Adams v. Murakami, 54 Cal.3d 105, 284 Cal.Rptr. 318, 813 P.2d 1348 (1991) 17

Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985) 9

BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996) 5, 11, 13

City of Vernon v. Southern Cal. Edison Co., 955 F.2d 1361 (9th Cir. 1992) 9

Comfort v. Lynn School Comm., 263 F.Supp.2d 209 (D. Mass. 2003) 9

Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 524 U.S. 424 (2001) 5, 11

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) 10

Freeman v. Allstate Ins. Co., 253 F.3d 533 (9th Cir. 2001) 14

Freund v. Nycomed Amersham, 326 F.3d 1070 (9th Cir. 2003), *opn. vacated and modified after rhg.*, ___ F.3d ___, 2003 WL 223189196 (9th Cir. Oct. 21, 2003) ..... *passim*

Haddad v. Lockheed California Corp., 720 F.2d 1454 (9th Cir. 1983) 11

Honda Motor Co. v. Oberg, 512 U.S. 415 (1994) ..5, 12, 14, 17

In re: Stucco Litigation, 175 F.R.D. 210 (E.D. N.C. 1997) 9

McEuin v. Crown Equip. Corp., 328 F.3d 1028 (9th Cir. 2003) 4, 16, 17, 18

TABLE OF AUTHORITIES – Continued

Page

Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991) 5, 10, 12

Planned Parenthood of Columbia/Williamette Inc. v. American Coalition of Life Activists, 290 F.3d 1058 (9th Cir. 2002), *cert. denied*, *American Coalition of Life Activists v. Planned Parenthood of Columbia/Williamette Inc.*, ___ U.S. ___, 123 S.Ct. 2637, 156 L.Ed.2d 655 (2003) 12

Shade Foods, Inc. v. Innovative Products Sales & Mktg., Inc., 78 Cal.App.4th 847, 93 Cal.Rptr.2d 364 (2000) 12, 18

State Farm Mutual Auto. Ins. Co. v. Campbell, 538 U.S. ___, 123 S.Ct. 1513, 155 L.Ed.2d 585 (April 7, 2003) ..... *passim*

United States v. Thevis, 665 F.2d 616 (5th Cir. 1982) 11

Wessmann v. Gittens, 160 F.3d 790 (1st Cir. 1998) 9

White v. Ford Motor Co., 312 F.3d 998 (9th Cir. 2002), *amended*, 335 F.3d 833 (9th Cir. 2003) 10, 15, 16, 18

STATUTES, RULES & REGULATIONS

Federal Rules of Evidence
Rule 403 ..... 8, 10

United States Constitution, Fourteenth Amendment ..... *passim*

INTRODUCTION AND INTEREST OF AMICI CURIAE[1]

The American Insurance Association ("AIA") and the Associations of Southern California Defense Counsel and Defense Counsel of Northern California and Nevada (hereafter referred to as "Defense Counsel," and collectively with AIA, as "amici") submit this brief in support of the petition for writ of certiorari of Crown Equipment Corporation ("Crown").

AIA is a non-profit national trade organization whose insurance company members comprise over 400 companies writing property and casualty insurance in every state and jurisdiction of the United States. These companies collectively represent more than one quarter of all property and casualty insurance underwritten annually in the United States. A substantial portion of AIA member companies' business is commercial liability insurance, the coverage which enables American businesses to provide the goods, services, jobs and investments vital to the country's economic health.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amici state that no counsel for any party has authored this brief in whole or in part and no person or entity, other than amici and their members, made a monetary contribution to the preparation or submission of this brief. Counsel who authored this brief are members of Defense Counsel, and one of Crown's insurers is a member company of AIA.

All parties have given consent under Supreme Court Rule 37.2 to the filing of this amici brief by stipulation filed concurrently with the Clerk of the Court.

Defense Counsel are non-profit professional associations of trial attorneys with over 3,000 members who practice before the state and federal courts in several of the western states within the Ninth Circuit. Defense Counsel are devoted to promoting the administration of justice and enhancing the standards of civil defense and trial practice through education, legislation and advocacy.

Amici and their members have a substantial interest in the issues presented. According to recent pronouncements by this Court, Due Process requires a substantially greater showing of unlawful conduct – the equivalent of criminal misbehavior, malice or intent to injure – before punitive damages may be imposed in the civil context. The evidence of defendant's "reprehensibility," both during and after the trial, must be closely scrutinized by the courts, with any doubts about the sufficiency of that evidence being resolved *against* the verdict in order to avoid the arbitrary imposition of punitive awards that offend Due Process standards.

The record in this case well illustrates that the lower courts are in conflict regarding proper application of these principles. William McEuin injured his foot in an accident while operating a standup forklift for his employer Price Costco ("Costco"). McEuin sued Crown, the manufacturer, for strict product liability under Oregon law maintaining that a forklift manufactured without "doors" was more dangerous than one manufactured with them. In addition to compensation for his injuries, McEuin claimed that punitive damages were warranted because Crown ignored applicable safety standards in the design of its lift equipment, and misrepresented those standards to purchasing

agents for his employer when the forklift was sold and delivered. App. 3a-4a.

Crown was denied Due Process protections when the trial court excluded evidence of a decades-long debate in the engineering community questioning the effectiveness of "doors" as a safety device on forklift equipment. Both the district court, and the court of appeals in its published decision, thereafter compounded the error by improperly reviewing the evidence "in the light most favorable" to the punitive damages verdict[2] – precisely the opposite of the "exacting scrutiny" standard which this Court has instructed must be applied to all aspects of a punitive damages award. Upholding a $1.25 million punitive judgment on appeal (over a vigorous dissenting opinion),[3] a majority of the Ninth Circuit panel held that the trial court did not "abuse its discretion" by excluding defense evidence supporting its no-door design, or alternatively, that preclusion of this evidence was "harmless error." App. 7a, 13a-14a. As *State Farm Mutual Auto. Ins. Co. v. Campbell*, 538 U.S. ___, 123 S.Ct. 1513, 155 L.Ed.2d 585 (April 7, 2003) was decided just a few weeks before the Ninth Circuit published its opinion in *McEuin*, AIA and other amici submitted briefs supporting Crown's petition for rehearing and suggestion for rehearing en banc

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[2] District court's post-trial mem., App. 25a-25b (emphasis added); maj. opn. on appeal, App. 5a and 16a.

[3] An identical compensatory damages verdict of $1.25 million was reduced by 50% because the jury found McEuin was equally at fault in causing his injuries. App. 6a; Crown Pet. at p. 2.

requesting clarification of these constitutional rules in light of *Campbell*.[4]

More recently, other divided panels of the Ninth Circuit have analyzed similar evidentiary issues, and applied differing standards of review, in response to constitutional challenges to punitive damages awards. Perhaps not surprisingly, these panels reached substantially different outcomes depending upon how those rules were applied. (See generally discussion in Argument, Sections II. and III. below.)

This Court should grant Crown's petition to clarify the rules governing the admissibility of exculpatory evidence bearing upon the state of mind of a defendant who is charged with punitive liability, and reaffirm that Due Process imposes heightened standards for judicial review of punitive damages claims at every stage of the proceedings. The development of clear guidelines in these areas of constitutional and procedural law is of significant importance to the business and legal community.

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[4] Amici's brief was accepted by the panel, and soon thereafter, Crown's petition for rehearing was denied with one minor modification. As modified, the opinion is published as *McEuin v. Crown Equip. Corp.*, 328 F.3d 1028 (9th Cir. 2003).

ARGUMENT

I. Since Due Process Requires "Exacting Scrutiny" of the Evidence Supporting a Plaintiff's Punitive Damages Claim, That Same Heightened Standard Should Apply to Rulings that Exclude Exculpatory Evidence Refuting the "Reprehensibilty" of a Defendant's Conduct with any Doubts Resolved in Favor of Admissibility.

A. Exclusion of Relevant Exculpatory Evidence Deprived Crown of Important Constitutional Safeguards in its Defense of the Punitive Damages Claim.

"The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or *arbitrary* punishments on a tortfeasor." *Campbell*, 155 L.Ed.2d at 600 (emphasis added). Earlier this year, *Campbell* amplified upon the policy reasons underlying the constitutional mandate on meaningful judicial scrutiny of punitive damages awards. "Compensatory damages are intended to redress a plaintiff's concrete loss while punitive damages are aimed at the different purposes of deterrence and retribution." *Id.* at 600-601.[5]

Because punitive damages serve the same general purpose as "criminal penalties" in a civil setting but

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[5] Citing *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 524 U.S. 424, 432 (2001) (*"Cooper"*); *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 568 (1996) (*"Gore"*); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19 (1991) (*"Haslip"*); *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994) (*"Honda"*). AIA and other insurance industry associations also participated as amici in *Campbell*. *See* 2002 WL 1964631 (U.S.).

without equivalent constitutional safeguards that would be afforded a criminal defendant, Due Process prohibits arbitrary deprivation of the civil defendant's property where punitive damages are sought. This requires heightened judicial scrutiny to assure that the jury receives objective legal guidelines that give "appropriate weight to evidence that is *relevant* and evidence that is tangential or only inflammatory." *Id.* at 600-601 (emphasis added). Due Process thus serves as both a substantive and procedural safeguard against arbitrary awards of punitive damages. *Ibid.*

As in earlier cases, *Campbell* "instructed courts reviewing punitive damages [after trial or on appeal] to consider three guideposts (1) the degree of reprehensibility of the defendant's misconduct, (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award, (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *Campbell, supra*, 155 L.Ed.2d at 601. Due Process further requires that, after conclusion of the trial, an appellate court must independently evaluate the evidence by "conduct[ing] de novo review of a trial court's application of [each guidepost] to the jury's award." *Ibid.*

To determine the defendant's reprehensibility – the most important indicium of a punitive award's reasonableness – a reviewing court must consider whether "the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others [and whether] the harm resulted from intentional malice, trickery, or deceit, or mere accident. . . . It should be presumed that a plaintiff has been made whole by compensatory damages,

so punitive damages should be awarded only if the defendant's culpability is so reprehensible to warrant the imposition of further sanctions to achieve punishment or deterrence." *Campbell, supra*, 155 L.Ed.2d at 602. In conducting this independent analysis, the most important element for the reviewing court to consider is evidence of defendant's "reprehensibility," including its *state of mind* demonstrating the equivalent of criminal disregard for the safety and welfare of others. *Id.* at 601-602, 605-607.

The evidentiary rulings made by the trial court in this case well illustrate the need for this Court to settle lingering questions of constitutional law governing the admissibility of evidence regarding this "most important indicium" of the validity of a given punitive liability verdict. *Campbell, supra*, 155 L.Ed.2d at 602.

Crown was deprived of important constitutional protections against the arbitrary imposition of punitive damages when the courts below excluded consideration of military specifications and two independent engineering reports recommending against the installation of doors on Crown's forklift – strong and persuasive evidence refuting McEuin's claim that this defendant had "acted with wanton disregard for the health, safety, and welfare of others." App. 18a-19a (O'Scannlain, J., dissenting).

B. Evidence of Defendant's State-of-Mind Refuting Plaintiff's Claim of Malice is not "Hearsay."

The record in this case presents a clear example of the kind of capricious and one-sided presentation of evidence resulting in an arbitrary punitive damages award. The

engineering evidence Crown offered was not inadmissable hearsay, and should not have been so cavalierly rejected by the lower courts as more prejudicial than probative under Federal Evidence Rule 403. Crown Pet. 24-25; App.19a-21a (O'Scannlain, J., dissenting).

As the dissenting opinion of Judge O'Scannlain aptly points out, "[McEuin] built his case for punitives on evidence tending to show that defendant wilfully disregarded its own accident data, ignored applicable safety standards, and lied to purchasers of its equipment, all in support of an overall strategy to stave off product liability litigation . . ." App. p. 19a (O'Scannlain, J., dissenting). But the jury only heard half the story: The fact that both of the independent engineering consultants Crown retained, after making detailed analysis, recommended *against* the addition of doors is strong evidence that Crown did not design its products with reckless indifference. App. 21a (O'Scannlain, J., dissenting).

The same is true of longstanding military design specifications known to Crown's engineers restricting the use of doors on forklifts for these very safety reasons. While Crown's engineers were apparently permitted to testify that they were aware of military specifications, they were precluded from explaining why those specifications were significant in the design of *this* product – directly refuting McEuin's claim that Crown had "misrepresented" applicable engineering considerations and acted with conscious disregard of the safety of forklift operators.

Crown rightly contends that this case has far-reaching implications in a number of areas, beyond products liability litigation. This case affects virtually any other context where the defendant's alleged intentional misconduct or

conscious disregard for the safety of others gives rise to a punitive liability claim – including, for example, professional liability, civil rights, employment practices and other statutory actions. *Cf.* Crown Pet. 23. Contrary to the views expressed by the district court and the Court of Appeals majority opinion, in such cases (even where only compensatory damages are sought), defendants are freely allowed to offer some "business justification" or other evidence of the reasons for their actions in order to refute claims of intentional wrongdoing or malice. *See, e.g., City of Vernon v. Southern Cal. Edison Co.*, 955 F.2d 1361, 1366 (9th Cir. 1992); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 608-611 (1985); *see also* App. 21a & n. 2 (O'Scannlain, J., dissenting) (rule applied to products liability and other claims); Crown Pet. 16-17.

In many actions requiring a fact-specific inquiry of the defendant's state of mind, including punitive damages claims, "the devil is in the details" (*see, e.g., Wessmann v. Gittens*, 160 F.3d 790, 797-798 (1st Cir. 1998); *Comfort v. Lynn School Comm.*, 263 F.Supp.2d 209, 249 (D. Mass. 2003)), and the outcome of a given case may be significantly affected by the interplay between federal procedural rules and the varying standards for recovery of punitive damages under state-based laws. *See In re: Stucco Litigation*, 175 F.R.D. 210, 216 (E.D. N.C. 1997); and cases discussed in Section III., *infra*.

However, the fact-specific nature of the inquiry should not dissuade the lower courts from following the constitutional principles enunciated by this Court's precedents when evaluating the sufficiency of evidence that support – or in Crown's case refute – claims for punitive damages. *See Freund v. Nycomed Amersham*, 326 F.3d 1070, 1087-1088 (9th Cir. 2003), *opn. vacated and modified after rhg.*,

___ F.3d ___, 2003 WL 223189196 at pp. *11-*14 (9th Cir. Oct. 21, 2003) (Gould, J., dissenting) (internal citations omitted).[6]

The "gatekeeper" role of the trial and appellate courts in performing this constitutional function is, thus, vital to assuring the fairness demanded by the constitution, and as illustrated by the present conflict among the lower courts, it is necessary for this Court to exercise its inherent power to fashion procedural and evidentiary guidelines consistent with the "exacting scrutiny" standard mandated by Due Process. *See, e.g., Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993); *see also White v. Ford Motor Co.*, 312 F.3d 998, 1007 (9th Cir. 2002), *amended*, 335 F.3d 833 (9th Cir. 2003); Crown Pet. 7 and 23.

C. Rule 403 Considerations Were Insufficient to Justify Denial of Crown's Constitutional Right to Offer Relevant Exculpatory Evidence in a Punitive Damages Trial.

The trial court should not have excluded this highly probative evidence under the balancing test of Rule 403.

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[6] In his dissenting opinion in *Freund*, Judge Gould of the Ninth Circuit dissenting called to mind the observation of Lord Mansfield: "The law does not consist in particular cases, but in general principles, which run through the cases, and govern the decision of them." *Freund, supra*, 326 F.3d at 1087 & n. 7 (9th Cir. 2003), *opn. vacated and modified after rhg.*, 2003 WL 223189196 at p. *14 & n. 8 (Gould, J., dissenting) (internal citation omitted); *see also Haslip,* 499 U.S. at 43 (O'Connor, J., dissenting) ("lack of clear guidance heightens the risk [of] arbitrariness, passion, or bias").

Where the defendant's state-of-mind is placed in issue – as in every punitive damages claim asserting malice or other "reprehensible" conduct worthy of financial censure – only rarely should a jury be precluded from hearing evidence offered by the defendant to explain its conduct. *See Haddad v. Lockheed California Corp.*, 720 F.2d 1454, 1459 (9th Cir. 1983); *United States v. Thevis,* 665 F.2d 616, 633 (5th Cir. 1982) (Rule 403 as applied in criminal or civil cases is an "extraordinary remedy to be used sparingly" to avoid "undue prejudice" to the accused-defendant by the exclusion of otherwise relevant evidence); *cf.* App. 19a and 22a-23a (O'Scannlain, J., dissenting) (prejudicial impact must "substantially outweigh" probative value).

This salutary limitation on Rule 403 applies with greater force for constitutional reasons whenever punitive damages are claimed because the defendant's alleged "reprehensibility" remains the "most important indicium" of the validity of any punitive damages verdict imposed, and evidence bearing on its state-of-mind is highly relevant to that inquiry. *Campbell, supra,* 155 L.Ed.2d at p. 602.

II. Before and After the Trial, the Lower Courts Failed to Apply the Constitutional Standard of Exacting Scrutiny When Evaluating the Alleged "Reprehensibility" of Crown's Conduct.

The Ninth Circuit majority overlooked another essential safeguard against arbitrary punitive awards: "Exacting appellate review ensures that an award of punitive damages is based upon an 'application of law, rather than a decisionmaker's caprice.'" *Campbell*, 155 L.Ed.2d at 601, citing *Cooper*, *supra*, at 436 (quoting *Gore*, *supra*, 517 U.S. at 587 (Breyer, J., concurring)).

McEuin's punitive damages claim under Oregon law required "clear and convincing evidence" of malice or conscious disregard for safety. App. 22a (O'Scannlain, J., dissenting).[7] In *Honda*, this Court "held unconstitutional an Oregon statute that prohibited courts from reviewing excessiveness of punitive damages awards unless there was *no evidence at all* to support the [punitive] verdict." *Freund v. Nycomed Amersham*, *supra*, 326 F.3d at 1079, n. 10, *opn. vacated and modified after rhg.*, 2003 WL 223189196 at p.*14, n. 10 (emphasis added), citing *Honda*, *supra*, 512 U.S. at 418, 426-427. Similarly, in *Haslip*, the Court made clear that Due Process is satisfied only where procedures are employed that provide "definite and meaningful constraint" on a jury's discretion to award punitive damages by allowing adequate and independent post-verdict review procedures. *Haslip*, *supra*, 499 U.S. at 20-24.

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[7] The Ninth Circuit en banc recently confirmed that, under this Court's constitutional doctrine, the legal determination of whether punitive damages have been proven by "clear and convincing evidence" is to be evaluated on appeal de novo – i.e., without substantial deference to the trial court's view of the evidence. *Planned Parenthood of Columbia/Williamette Inc. v. American Coalition of Life Activists*, 290 F.3d 1058, 1086 (9th Cir. 2002) (en banc), *cert. denied*, *American Coalition of Life Activists v. Planned Parenthood of Columbia/Williamette Inc.*, ___ U.S. ___, 123 S.Ct. 2637, 156 L.Ed.2d 655 (2003). State laws requiring "clear and convincing" proof of malice may serve as "an important check against unwarranted imposition of punitive damages." *Honda*, *supra*, 512 U.S. at 433. This higher standard has been described as requiring evidence " 'so clear as to leave no substantial doubt'; 'sufficiently strong to command the unhesitating assent of every reasonable mind.' " *Shade Foods, Inc. v. Innovative Products Sales & Mktg., Inc.*, 78 Cal.App.4th 847, 891, 93 Cal.Rptr.2d 364, 394 (2000) (California law requiring "clear and convincing" evidence of malice).

> Read together *Haslip* and *Honda* teach that . . . it is the availability of post-verdict review that provides the most meaningful check on punitive damages. *White v. Ford Motor Co., supra,* 312 F.3d at 1025 (Graber, J., dissenting).

Campbell and *Gore* were likewise concerned with post-verdict review that assured some meaningful judicial evaluation of the evidence of malice, and avoiding "excessive" awards of punitive damages even after the defendant's malice had been demonstrated by the sufficient quantum of proof.

> [N]othing could be more "arbitrary" than to permit punitive damages in any amount to stand absent evidence of malice that is required by state law for imposition of punitive damages. A defendant such as [Crown], who acted without malice and who should not receive a punitive fine, must not be treated worse than a defendant who acted with malice and who deserves some punitive fine but in a lesser amount.

Freund v. Nycomed Amersham, supra, 326 F.3d at 1086 & n. 6, *opn. vacated and modified after rhg.*, 2003 WL 223189196 at pp. *13-*14 & n. 7 (Gould, J., dissenting).

Such independent analysis of the evidence was markedly absent here. Throughout all phases of the proceedings, the lower courts turned the constitutional requirement of "exacting scrutiny" on its head. Disregarding Due Process considerations, the district court improperly required the *defendant* (Crown) to demonstrate under Rule 403 that the probative value of the evidence it offered

"outweighed" the potential prejudicial impact.[8] Then after the punitive verdict was rendered, both lower courts continued to view the evidence "in the light most favorable" to *imposing* punitive damages.[9] Such rulings and procedures are disturbingly reminiscent of Oregon's statutory scheme which lacked meaningful post-verdict review – contrary to Due Process standards consistently articulated by this Court since *Honda*.

Amici submit that, under the de novo standard of "exacting scrutiny" plainly enunciated in *Campbell*, *Honda* and other recent decisions of this Court, Crown should not have been precluded from offering evidence which, if duly considered by the jury (or the trial court for that matter), likely would have altered the outcome of at least the punitive damages verdict. App. 22a (O'Scannlain, J., dissenting).[10]

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[8] Even when Crown obtained the affidavit from one of Costco's purchasing agents after trial which directly contradicted plaintiff's claim that "[representatives of his employer] Jim Perry and Derek Tatum wanted doors" installed on Crown forklifts, the district court concluded that this exculpatory evidence was not "clear and convincing" proof warranting a new trial. App. 32a-36a (discussing Tatum's affidavit denying the statements attributed during closing argument).

[9] Remarkably, the majority opinion in this case concluded this amounted to "harmless error" under the circumstances. App. 13a-14a; *cf.* App. 22a (O'Scannlain, J., dissenting) citing *Freeman v. Allstate Ins. Co.*, 253 F.3d 533, 536 (9th Cir. 2001) (prejudicial evidentiary error requiring reversal).

[10] There is ample authority for the proposition that where the defendant presents evidence that there was at least some objectively plausible reason for its conduct – here, manufacturing a forklift without doors – the reprehensibility prong cannot be established as a matter of law and the claim for punitive damages should not be submitted to the jury. *See, e.g.*, *Campbell*, *supra*, 155 L.Ed.2d at 604-607.

Just as all aspects of the plaintiff's evidence are subjected to heightened scrutiny in order to avoid arbitrary and capricious punitive awards in the civil setting, the same "exacting scrutiny" should apply to judicial rulings that deprive the defense of the legitimate opportunity to refute a claim of "reprehensible" conduct at every phase of the punitive liability case – before, during and after trial. *Campbell, supra*, 155 L.Ed.2d at 600-602, 604-607.

III. As Illustrated by the Majority Opinion in This Case, Decisions Within the Ninth Circuit Are Applying Due Process Principles in Punitive Damages Cases in an Arbitrary and Inconsistent Manner That Conflicts With This Court's Constitutional Jurisprudence.

Crown predicts that the views expressed by the majority opinion in this case are destined to give rise to inter-circuit conflict in the evaluation of punitive awards. Crown Pet. 17-18. Within the Ninth Circuit, that conflict is already evident.

One need only compare another recent products liability decision (involving the death of a child in a "rollaway" accident) that resulted in the reversal of a punitive damages award. In *White v. Ford Motor Co.*, *supra*, 312 F.3d 998 (9th Cir. 2002), *amended*, 335 F.3d 833 (9th Cir. 2003), another divided panel of the Ninth Circuit held that a $70 million punitive damages award was improper because erroneous jury instructions regarding extraterritorial conduct (compounded by improper closing argument) violated Due Process.

Although the *White* opinion addresses the unconstitutionality of imposing "extraterritorial" punitive damages liability on a defendant, it is premised on a Due Process analysis utterly lacking in the majority's opinion here.

According to *White*, the mere possibility that the jury's award encompassed a defendant's extraterritorial conduct rendered the award unconstitutional, "even if the size of the award itself . . . is not outside the bounds of due process." *White, supra*, 312 F.3d at 1016. In other words, if the evidence presented to the jury does not comport with Due Process, the award must be set aside regardless of its size.[11]

White stands in stark contrast to the majority opinion in this case. *White* implemented Due Process guidelines (without the benefit of this Court's recent discussion of similar issues in *Campbell*),[12] subjecting the punitive damages award to a searching inquiry and reversing where the award is based on improper jury considerations that should have been excluded (or admitted for only a

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[11] The dissenting opinion in *White* asserted that there are no clear guidelines for trial and appellate judges to follow in giving jury instructions or receiving evidence bearing on the "reprehensibility" prong of a punitive damages claim. According to the dissent, the *White* majority should have applied an "abuse of discretion" test – instead of de novo review – the same erroneous standard employed by the majority in *McEuin* (although *White* does not mention the present case by name). *White, supra*, 312 F.3d at 1025, 1028-1029 (Graber, J., dissenting).

[12] *Campbell* and *White* express concern over the imposition of punitive liability for extraterritorial conduct on the part of the defendant which may result in the assessment of a fine or sanction for conduct that is lawful outside the jurisdiction where the trial took place. *See Campbell, supra*, 155 L.Ed.2d at 604-607. Similar evidentiary issues are presented here given McEuin's theory that punitive damages were warranted because Crown disregarded worker safety in violation of Oregon law owing to some perceived "strategy to stave off product liability litigation" by preventing other potential plaintiffs from inferring that the absence of a door was a design defect. App. 19a (O'Scannlain, J., dissenting); App. 4a-5a.

limited purpose). In *McEuin*, the majority applied a far more deferential standard of review and held that the exclusion of exculpatory evidence relating to reprehensibility was "harmless error."

More recently, *Freund v. Nycomed Amersham,* 326 F.3d 1070 (9th Cir. 2003), *opn. vacated and modified after rhg.*, ___ F.3d ___, 2003 WL 223189196 (9th Cir. Oct. 21, 2003) reinstated a $1 million-plus punitive damages verdict in a California employment discrimination case. The district court had concluded after post-verdict motions that the evidence of defendant's malice was constitutionally deficient, and, accordingly, entered judgment as a matter of law in favor of the employer on the punitive claim. *Freund*, *supra*, 326 F.3d at 1074, *opn. vacated and modified after rhg.*, 2003 WL 223189196 at p. *2. After rehearing, yet another 2-to-1 majority panel of the Ninth Circuit reversed the district court's order – this time concluding that the defendant had "waived" the right to post-trial constitutional review of evidence supporting the punitive damages verdict. *Id.*, 326 F.3d at 1079, *opn. vacated and modified after rhg.*, 2003 WL 223189196 at p. *6.

The dissent disagreed. Under California law and applicable Due Process precedent, the defendant-employer's constitutional right to challenge the punitive award for lack of malice could not be "lost" by a mere technical failure to follow the requisite procedure.[13]

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[13] *Freund*, *supra*, 326 F.3d at 1082, *opn. vacated and modified after rhg.*, 2003 WL 223189196 at pp. *9-*11 (Gould, J., dissenting) citing *Adams v. Murakami*, 54 Cal.3d 105, 284 Cal.Rptr. 318, 813 P.2d 1348, 1354, n. 5 (1991); *Honda*, *supra*, 512 U.S. at 434-435. *See also*

(Continued on following page)

Moreover, the dissent reasoned that "the [Supreme] Court made clear that post-verdict review of punitive damages is the most important procedural safeguard on punitive damage awards and [has] held that lack of meaningful review of jury verdicts violates the Due Process Clause[.]" *Freund*, *supra*, 326 F.3d at 1087-1088, *opn. vacated and modified after rhg.*, 2003 WL 223189196 at p. *13 (Gould, J., dissenting).

McEuin, *White* and *Freund* are examples of the differing approaches courts within this circuit have taken when applying Due Process guidelines to punitive damages awards in just the past few months. But they also represent an intolerable degree of variance in constitutional jurisprudence.

CONCLUSION

Crown's petition raises important questions concerning the interplay between the rules of evidence and Due Process protections against improper awards of punitive damages. The constitutional safeguards established by this Court against arbitrary awards, on the one hand, should not be taken away by the lower courts, on the other hand, by impermissibly limiting the defendant's right to offer relevant evidence refuting the punitive claim.

Shade Foods, Inc. v. Innovative Products Sales & Mktg., Inc., *supra*, 78 Cal.App.4th at 891, 93 Cal.Rptr.2d at 394 (punitive damages reversed on appeal as a matter of law) and cases digested in Argument, Section II, n. 7 above.

Amici urge this Court to grant certiorari to address how Due Process concerns affect the proper evaluation of evidence in a punitive damages case, and the necessity of judicial review of that evidence with exacting scrutiny to avoid similarly capricious outcomes.

Respectfully submitted,

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